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# A Rejoinder to Lester Brickman: On the Theory Class's Theories of Asbestos Litigation

Charles Silver\*

## INTRODUCTION

In 2003, the *Pepperdine Law Review* hosted a conference on mass tort litigation and later published a symposium issue containing the articles presented there. Professor Lester Brickman and I participated in a panel devoted to legal ethics. I listened to Professor Brickman's spoken remarks, and I am certain he said nothing about me personally. I was therefore surprised to discover that an entire section of Professor Brickman's published article contained a personal attack on me. I was also dismayed to read a host of misstatements and misleading statements, none of which Professor Brickman attempted to verify by checking with me. His article exemplifies its subtitle: "The Disconnect Between Scholarship and Reality."<sup>1</sup>

In this essay, I hope to accomplish two things. First, I will correct the record by identifying Professor Brickman's fallacious assertions.<sup>2</sup> Second, I will discuss the role legal academics do and should play in framing the public debate about lawyers and legal processes. Statements of Professor Brickman's that have appeared in the media recently will figure in the second discussion.

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1. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33 (2003) [hereinafter "*Theory Class*"].

2. Professor Brickman adds more mud to the waters in his rejoinder to this essay, Lester Brickman, *A Rejoinder To The Rejoinder To On The Theory Class's Theories of Asbestos Litigation*, 32 PEPP. L. REV. 781 (2005) [hereinafter "*Rejoinder*"]. I will respond to his *Rejoinder* in footnotes.

## I. SETTING THE STAGE

A bit of history will help the reader understand why Professor Brickman attacked me in the article he published in this law review. In 1999, the *Texas Tech Law Review* printed an article of mine pointing out that certain commentators on legal ethics, one of whom was Professor Brickman, seemed to display a bias in their public statements about attorneys.<sup>3</sup> They loudly condemned a plaintiffs' asbestos firm that was accused of fabricating evidence, but they said nothing about a lawyer for an asbestos defendant who was adjudged to have committed analogous misconduct. My interest, then as now, was not in the truth of the charges against the attorneys, but in the public debate over tort law and in the efforts of academics and others to generate anger against trial lawyers who represent plaintiffs.<sup>4</sup>

Awhile later, Professor Brickman and I participated in a conference held at the law school at William & Mary.<sup>5</sup> During my presentation, I asked Professor Brickman whether he was familiar with the defense lawyer my prior article discussed. He admitted knowing the lawyer, claimed to be familiar with the relevant facts, praised the lawyer's character, and described my allegations as libelous. I immediately read the audience, which included many law professors, citations for the published sanctions cases in which the lawyer was disciplined. I then asked Professor Brickman whether he knew any facts that contradicted my statements. In reply, he said only that the cases were still on appeal. This was untrue. Both decisions were final.

After the William & Mary conference ended, I wrote Professor Brickman, asked him to state any facts he knew that were at odds with those I presented, and asked him to provide copies of any documents supporting his assertions. In response, he stated that his "knowledge about the subject matter was incomplete" and that he "[was] not in any position to offer a more detailed explanation of the facts."<sup>6</sup> He provided no documents. I then composed an addendum to the article I presented at William & Mary describing the events that occurred at the conference and thereafter. Until now, Professor Brickman has not questioned the accuracy of my account.<sup>7</sup> Nor, to my knowledge, has anyone else who attended the conference.

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3. Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1383, 1401-03 (1999) [hereinafter "Preliminary Thoughts"]. I have recently argued that certain prominent federal judges have contributed to the partisan cause of tort reform by wrongly characterizing class actions as "legalized blackmail." See Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

4. *Id.* at 1403 (offering two possible explanations for the commentators' silence and pointing out that both "shed light on the manner in which the propaganda war for control of the civil justice system is being fought").

5. I have previously chronicled the events that occurred at and after the conference. See Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 323, 352 (2001) [hereinafter "Critique of Burrow"].

6. *Id.* at 354 n.4.

7. In his *Rejoinder*, *supra* note 2, at 790, Professor Brickman accuses me of "mischaracterize[ing] [his] remarks at the conference and our correspondence thereafter." I stand by my account, published in 2001, which was written when memories of the events were still fresh. See *Critique of Burrow*, *supra* note 5, at 352.

## II. PROFESSOR BRICKMAN'S MISTATEMENTS

The reader may now understand why Professor Brickman took aim at me in this law review. Unfortunately, he fired mainly misstatements.

*Misstatement 1: Professor Brickman asserts that I "assisted" an "assault on [attorney William] Skepnek."*<sup>8</sup>

William Skepnek was the defense lawyer for Raymark Industries whom Texas judges sanctioned for knowingly filing false affidavits.<sup>9</sup> Baron & Budd was the law firm that represented the plaintiffs in the lawsuits where the affidavits were filed and that initiated the sanctions requests.<sup>10</sup>

Many readers will recall that Baron & Budd once stood accused of fabricating evidence by using a witness preparation memorandum that supposedly told its clients to lie.<sup>11</sup> When a young lawyer mistakenly turned over the memorandum at a deposition, charges of suborning perjury filled the air.<sup>12</sup> To my knowledge, the charges never led to sanctions or criminal convictions. They remained mere allegations of wrongdoing.

Skepnek believes that Baron & Budd orchestrated an attack on his use of false affidavits to deflect attention from its own wrongdoing.<sup>13</sup> In the article published in this journal, Professor Brickman makes Skepnek's case and attempts to minimize the significance of Skepnek's adjudicated misconduct.<sup>14</sup>

Professor Brickman also attempts to link me to Baron & Budd's alleged plot, asserting that I "assisted" Baron & Budd's "assault" on Skepnek.<sup>15</sup> The

8. See *Theory Class*, *supra* note 1, at 161.

9. *Id.* at 159.

10. See, e.g., *Skepnek v. Mynatt*, 8 S.W.3d 377 (Tex. Ct. App. 1999).

11. See generally, *Preliminary Thoughts*, *supra* 3.

12. See Walter Olson, *Thanks for the Memories*, Reasononline (June 1998), available at <http://reason.com/9806/col.olson.shtml> and <http://overlawyered.com/articles/olson/memories.html> (excoriating Baron & Budd and reporting that a "first-year associate . . . hand[ed] over to the opposing lawyer a stack of papers without realizing it contained an extra document he certainly did not intend to hand over").

13. *Critique of Burrow*, *supra* note 5, at 356 (reporting that in personal correspondence Skepnek characterized "himself as a victim of a campaign that Fred Baron undertook to distract attention from Baron & Budd's misconduct" relating to use of the witness preparation memo).

14. *Theory Class*, *supra* note 1, at 158-161.

15. *Id.* at 161. In his *Rejoinder*, *supra* note 2, at 786, Professor Brickman writes that "Skepnek's futile pursuit of the script memo had drawn Professor Silver's wrath." This claim is bizarre. First, I never criticized Skepnek (or any other lawyer) for attempting to obtain the Baron & Budd memo. Such efforts were proper, I believe, as part of the ordinary process of discovery undertaken on behalf of asbestos defendants. (By saying the efforts were proper, I do not mean discovery should have been granted. To reach that conclusion, one would have to work through the attorney-client privilege issues, which I have not done.) Second, when writing *Preliminary Thoughts*, I knew nothing about Skepnek's efforts, futile or otherwise, to get the memo, which was freely available on the internet in any event. As the citations in *Preliminary Thoughts* indicate, I knew only that Skepnek publicly criticized Baron & Budd in two articles published in the *Dallas Morning News*. To me, this

charge is false.<sup>16</sup> I played no role in any sanctions or contempt proceedings brought against Mr. Skepnek by Baron & Budd or anyone else. Baron & Budd never consulted me on any matter having anything to do with him. I learned about these proceedings after they occurred when Skepnek appeared as counsel in *Burrow v. Arce*, a case filed in the Texas Supreme Court that I discuss below.<sup>17</sup> On doing some research in connection with that case, I learned about the sanctions decisions.

I later wrote about the sanctions decisions in "Preliminary Thoughts," the article I published in the *Texas Tech Law Review*.<sup>18</sup> I did so because it seemed odd to me that Professor Brickman and other commentators heaped scorn upon Baron & Budd for using the witness preparation memorandum but said nothing about the adjudicated use of a false affidavit by an asbestos defendant. The pattern still seems to me to evince a bias. However that may be, there was no connection between my article and Baron & Budd. I do not believe anyone at Baron & Budd even knew I was working on it until I presented it at the conference at the Texas Tech Law School that preceded its publication.

*Misstatement 2: Professor Brickman asserts that I published an article "defending Baron & Budd's use of [a certain witness preparation] script memo."*<sup>19</sup>

In his article in this law review, Professor Brickman asserts that in "Preliminary Thoughts" I "defend[ed] Baron & Budd's use of" the controversial witness preparation memorandum mentioned above.<sup>20</sup> Here is what I wrote:

At one deposition, a first year lawyer mistakenly produced [the form witness preparation memorandum] in response to a request from the defense. The defendant then disseminated the form widely and accused Baron & Budd of scheming to bilk it and other manufacturers out of millions of dollars by teaching clients to commit perjury. The bases for the charge were the portions of the form that instructed clients on their testimony. *These were badly written, to say the least. Many persons who read them concluded that they told clients to lie. Considering only the form . . . it is easy to see why they had this impression.*<sup>21</sup>

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seemed an odd thing for him to do, given that he had himself been sanctioned for fabricating evidence. See generally *Preliminary Thoughts*, *supra* note 3.

16. Professor Brickman now admits that "[he has] no knowledge that [I] was acting in concert with Baron & Budd," and he "accept[s] [my] denial of any such relationship." *Rejoinder*, *supra* note 2, at 790.

17. See *Arce v. Burrow*, 958 S.W.2d 239 (Tex. Ct. App. 1997) (listing William J. Skepnek as counsel for plaintiffs), *Judgment Affirmed in Part, Reversed in Part* by *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

18. *Preliminary Thoughts*, *supra* note 3.

19. *Theory Class*, *supra* note 1, at 161-62.

20. *Id.* at 161.

21. *Preliminary Thoughts*, *supra* note 3, at 1399 (emphasis added).

Readers can judge for themselves whether these words constitute a defense of the firm's use of the memorandum.<sup>22</sup>

In the same article, I also advanced some economic arguments for using forms and other mass processing techniques to reduce costs in multiple-client representations.<sup>23</sup> Obviously, these arguments were not directed at, and did not defend, the content of the particular memorandum employed by Baron & Budd.<sup>24</sup>

*Misstatement 3: Professor Brickman asserts that I "had been retained by Baron & Budd to give [my] blessing<sup>25</sup> to the use of the Script Memo."<sup>26</sup>*

In today's overheated political environment, trial lawyers are accused of greed and unethical conduct at every turn. Professor Brickman has contributed to this state of affairs. He has criticized trial lawyers repeatedly, abetted partisan political efforts to prevent them from being paid, and supported the creation of legal causes of action that would enable clients to sue them more easily.<sup>27</sup>

22. Not content with the plain language of my article, Professor Brickman asserts that "[a]nyone who was aware that Professor Silver had previously been retained by Baron & Budd to aid in its defense of the script memo would perceive Professor Silver's article as a defense of the script memo — as I did." *Rejoinder*, *supra* note 2, at 785. I submit that Professor Brickman is not a typical reader of my work.

23. *Preliminary Thoughts*, *supra* note 3, at 1397.

24. Brickman further attempts to spin my article as a defense of Baron & Budd by asserting that my observation "that no one at the firm has ever been sanctioned or disciplined for use of the script memo[] impl[ie]d that [the memo] violated no rules or laws." *Rejoinder*, *supra* note 2, at 785. The implication exists solely in Brickman's imagination. I was not even discussing the legality of the memo when I observed that no one at Baron & Budd had been punished. I was pointing out that Brickman, a prominent critic of the plaintiffs' asbestos bar, pounced on Baron & Budd for using the memo, while saying nothing about adjudicated evidence fabrication committed by an asbestos defendant and its attorney. See *Preliminary Thoughts*, *supra* note 3, at 1402. Brickman converts a charge of inconsistency and bias against him into a defense of Baron & Budd.

25. Brickman's repeated use of the verb "to bless" is purely malevolent spin. He might have said that Baron & Budd hired me "to evaluate" or "to assess" the memorandum, but a neutral phrase would not have attributed nefarious motives to my clients or impugned my character, so he used a pejorative one.

26. *Theory Class*, *supra* note 1, at 162.

27. Professor Brickman's criticisms of trial lawyers are well documented. See, e.g., 20/20 (ABC television broadcast, Mar. 16, 1998), 1998 WL 5433531 (In this transcript of the television program on trial lawyers' demands for payment in Florida's tobacco case Lester Brickman states: "It's an outrage! It's just—it's more than greed. It's a scam."); Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What to Say*, WASH. POST, Jan. 13, 1998, at A15 (accusing Baron & Budd of unlawfully coaching witnesses); Adam Liptak, *In 13 States, a United Push to Limit Fees of Lawyers*, N.Y. TIMES, May 26, 2003, at A10 (quoting Brickman as stating that "[l]egal fees are not competitive because [trial] lawyers have colluded to maintain a fixed 33 percent rate regardless of the nature or difficulty of the case"). Brickman's support of partisan efforts to prevent trial lawyers from receiving fees at contracted-for rates is also well documented. See, e.g., Lester Brickman, *Want to be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A11 (urging Congress to impose "an excess-profits tax on lawyers' fees in the tobacco litigation"). See also Amy Ridenour, *Billion-Dollar Legal Paydays Hurt Ordinary Americans*, NATIONAL POLICY ANALYSIS #230, Na-

Not surprisingly, many plaintiffs' attorneys have sought to protect themselves from misconduct charges by hiring law professors as advisors on problems of professional responsibility, a practice that obviously increases plaintiffs' costs. I have advised many plaintiffs' attorneys, including lawyers at Baron & Budd, who wanted to "do the right thing" with respect to their clients and generally knew how to do it, but were worried about proceeding without the added protection of an opinion from a credentialed ethics consultant.

Professor Brickman asserts that "Baron & Budd" retained me "to give [my] blessing to [its] use of the Script Memo."<sup>28</sup> Again, the charge is false. Baron & Budd never retained me for this purpose. The firm contacted me *after* the melee erupted, by which time all use of the memo had stopped. It would have been impossible for me to "bless . . . the use of the Script Memo," as Professor Brickman asserts.<sup>29</sup>

My involvement also was relatively minor. Baron & Budd asked me to read the witness preparation form and some other materials for the purpose of helping it assess its exposure and that of its lawyers. I also eventually composed an affidavit containing some of my opinions.<sup>30</sup>

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tional Center for Public Policy Research (Jan. 1999), *available at* <http://www.nationalcenter.org/NPA230.html> (reporting that "Alabama Senator Jeff Sessions . . . has suggested [imposing] a 'wind-fall profit tax' on billion-dollar legal paydays"); Elizabeth Neff, *Plan Would Cap Contingency Fees*, SALT LAKE TRIB., May 25, 2003, at E1 (describing attempt to convince the Utah Supreme Court to adopt an early settlement offer proposal, which includes a cap on contingent fees and which Brickman helped design); Tim W. Ferguson, *Tort retort: California's trial lawyers are fighting back against tort reform. Don't count them out yet.*, FORBES, Feb. 12, 1996 (reporting that Brickman "helped write" a California tort reform initiative that would limit contingent fees to "15% in most personal injury cases, roughly half what the lawyers now take"). Professor Brickman also supports causes of action that make it easier for plaintiffs to sue trial lawyers. *See, e.g., Preliminary Thoughts*, *supra* note 3, at 1402 (noting that Brickman aligned himself with the plaintiffs in *Burrow v. Arce*, supporting the creation of a cause of action for breach of fiduciary duty in the absence of provable harm).

28. *Theory Class*, *supra* note 1, at 162.

29. Brickman responds to this point by stating that "Baron & Budd argued in court that Professor Silver's affidavit supported their position that there had been no wrongdoing." *Rejoinder*, *supra* note 2, at 784. In support, he cites an article that appeared in 1997. *Id.* at 782 n.8 (citing Tim Wyatt, *Law Firm's Memo in Asbestos Lawsuit Sparks Debate*, DALLAS MORNING NEWS, Sept. 28, 1997, at 1A). I gave Mr. Baron one affidavit, and it is dated May 8, 1998. Brickman thus asserts that Baron & Budd relied on my affidavit *before it existed!* Brickman also writes that Fred Baron stated in court that "two legal ethics experts" reviewed the witness preparation memo and found nothing wrong with it, citing the same 1997 article in support. *Rejoinder*, *supra* note 2, at 784. He then asserts that I was one of those experts, citing a 2001 news report. *Id.* at 782 n.9 (citing Thomas Korosec, *Homefryn' with Fred Baron*, DALLAS OBSERVER, Mar. 29, 2001, at 1, *available at* <http://www.dallasobserver.com/issues/2001-03-29/feature.html/1/index.html> (last visited Aug. 6, 2003)). In fact, Mr. Baron hired several ethics experts, including Jim McCormack and William Hodes, both of whom, unlike me, participated in the matter in Corpus Christi where the witness preparation memo was disclosed. *See* W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1351 (1999) (quoting Hodes: "I was paid for my involvement in the Corpus Christi asbestos case, and the affidavit I wrote was clearly an advocacy document designed to persuade the court that Baron & Budd's witness preparation techniques were not beyond the pale."). Brickman implausibly infers that Mr. Baron relied on an affidavit by me that did not exist instead of the written and oral opinions of other experts that did exist.

30. Affidavit of Professor Charles Silver, dated May 8, 1998, *available at* <http://www.utexas.edu/law/faculty/csilver/class/prforlit.html#Heading3>. The webpage is password protected because it

*Misstatement 4: Professor Brickman states or implies that I hid my relationship with Baron & Budd. He does not explain how I benefited by doing so, but he seems to think I had a nefarious purpose.*<sup>31</sup>

Professor Brickman believes I kept my relationship with Baron & Budd a secret.<sup>32</sup> In fact, my involvement in the witness preparation controversy was common knowledge. Fred Baron made no secret of it. He disclosed my retention to news reporters.<sup>33</sup> It made sense for him to do this. He had hired a battery of ethics experts partly to show that Baron & Budd was responding seriously to the allegations it faced. Baron & Budd also obtained a signed expert witness affidavit from me that made it into the public realm.<sup>34</sup> A reporter writing for the *Dallas Observer* quoted from it.<sup>35</sup>

Nor have I hidden the relationship. For years, I told students in my professional responsibility classes of my involvement when teaching about the ethics of witness preparation. I even gave them my signed affidavit to review and made the affidavit available on the internet, eliminating any chance that any student might think I was uninvolved.<sup>36</sup> A "Google" search on "professor silver baron budd" will direct anyone to the webpage.<sup>37</sup> I also expressly acknowledged my relationship to the firm in the *William and Mary Environmental Law and Policy Review*, writing that "I [was] one of the [law] professors Mr. Baron consulted."<sup>38</sup> When, in that article, I chided the pundit Walter Olson for failing to contact me and for misstating the name of an-

contains works downloaded from Westlaw. Anyone who desires a copy of my affidavit may obtain one by writing or emailing me at the University of Texas School of Law.

31. *Theory Class*, *supra* note 1, at 162.

32. *Id.*

33. See, e.g., John Council, *Baron & Budd Recaptures Stray Memo: Appeals Court Agrees Deposition "Coaching" Shielded by Privilege*, TEXAS LAWYER, Feb. 9, 1998 [hereinafter *Stray Memo*]; Thomas Korosec, *Homefryin' with Fred Baron*, DALLAS OBSERVER, Mar. 29, 2001 [hereinafter *Homefryin'*].

34. Affidavit of Professor Charles Silver, *supra* note 31.

35. *Homefryin'*, *supra* note 29.

36. See *supra* note 2.

37. Professor Brickman chides me for "not disclos[ing] the contents of [my] affidavit in [this essay]" and for using a password to limit access to the website where it was posted. These are true red herrings designed to deflect attention from Professor Brickman's shoddy research. First, although Professor Brickman knew about my affidavit, he never asked me for a copy of it. That would have been the simplest way to obtain it. Second, the affidavit was publicly available because a newspaper reporter quoted from it in an article Professor Brickman repeatedly cites. See Brickman, *Rejoinder*, *supra* note 2, at 784 (referencing my affidavit in *Homefryin'*, *supra* note 29). Evidently, he didn't ask the reporter for the affidavit either. Third, I sent the editors of this journal a copy of the affidavit along with this essay, and the editors then forwarded both the essay and the affidavit to Professor Brickman. How much more disclosure could he want? Fourth, the website is password protected because, as indicated above, *supra* note 30, Westlaw insisted on that as a condition for allowing me to post its copyrighted materials.

38. *Critique of Burrow*, *supra* note 5, at 355 n.7.



other ethics expert, Jim McCormack, it was because I believed our identities were easy to learn.<sup>39</sup>

Indeed, I could not have hidden the relationship had I wanted to. Other experts working for Baron & Budd, including Professor W. William Hodes and Mr. McCormack, knew I was involved. Several of my University of Texas Law School colleagues knew as well. The witness coaching controversy was a matter of some interest at the Law School, as one might expect. Under the circumstances, any attempt to hide the relationship would have failed.

The only fact supporting Professor Brickman's charge is my failure to disclose my relationship with Baron & Budd in "Preliminary Thoughts." I believe I omitted the disclosure for two reasons.<sup>40</sup> First, I received no financial support from the firm for writing the article. Second, I did not bill Baron & Budd for services relating to the witness preparation controversy.<sup>41</sup> I suspect, but cannot prove, that Professor Brickman knew the second reason when he attacked me in this journal, for I stated it in a letter to William Skepnek in 2001.<sup>42</sup> Because Professor Brickman knew Skepnek and worked with him,<sup>43</sup> I believe he had access to this communication.<sup>44</sup>

A third reason also mattered to me. When I wrote "Preliminary Thoughts," I was upset by the uses certain academics had made of my ties to the insurance industry in the battle over the treatment of insurance defense ethics in the Restatement (Third) of the Law Governing Lawyers.<sup>45</sup> In my opinion, they used those ties to deflect attention from the weakness of their positions. The experience soured me greatly<sup>46</sup> and left me feeling that aca-

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39. *Stray Memo*, *supra* note 33. This article, which appeared months before Olson's column, identified both Mr. McCormack and me by name.

40. Because I am relying partly on memory, I cannot conclusively rule out the possibility that I simply failed to notice that a disclosure was missing. If this is the correct explanation, then I apologize for the error and gladly correct it.

41. I have done other work for Baron & Budd, both for compensation and *pro bono*.

42. Letter from Silver to Skepnek of Apr. 18, 2001 (on file with the author and editors).

43. *Preliminary Thoughts*, *supra* note 3, at 1402 (discussing Brickman's association with Skepnek); *Critique of Burrow*, *supra* note 5, at 353 (also discussing Brickman's association with Skepnek).

44. In his *Rejoinder*, Professor Brickman denies none of the assertions in this paragraph. His silence implies that he did know that I never billed Baron & Budd for services relating to the witness preparation memo. Given this, one might have expected him to soften his criticism or withdraw it. One might also have expected him to explain why professors must disclose their professional relationships in their published writings when they work without charge, given that no financial interest conflict exists. Professor Brickman does neither.

45. See Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773 (1998) (describing the rancorous debate over the treatment of the professional responsibilities of insurance defense lawyers in the Restatement (Third) of the Law Governing Lawyers).

46. Bill Hodes, the author of an article on the witness preparation controversy that appeared in the same issue as "Preliminary Thoughts", recalls that, at the conference that preceded publication, I voiced concerns about the uses that had been made of my ties to the insurance industry. He even wrote about and took issue with my "disclaimer about disclaimers." See W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1351 n.52 (1999).

demic debate may be more merits-oriented when professional ties are not disclosed.<sup>47</sup>

Obviously, I misjudged. By failing to disclose, I merely replaced one source of cheap shots with another. The price of consulting engagements appears to be that one will be subject to *ad hominem* attacks whether one discloses or not.<sup>48</sup> In any event, I have disclosed consulting engagements and funding sources many times,<sup>49</sup> and I gladly take this opportunity to acknowledge my relationship with Baron & Budd.

*Misstatement 5: Professor Brickman asserts that I "had been retained by the Texas tobacco attorneys to give [my] blessing to their fee request."<sup>50</sup>*

In 1996, the private attorneys handling Texas' lawsuit against the tobacco industry retained another law professor and me to evaluate the propriety of certain expenses relating to a public relations effort that was to be carried out in connection with the litigation. I played no role in the negotiation or drafting of the attorneys' contingent fee contract with the State, which was signed before I was hired.

As the lawsuit progressed, other matters with professional responsibility overtones arose and my role expanded, as did the number of law professors working with me. In all, five members of the University of Texas faculty provided assistance.<sup>51</sup>

When the lawsuit settled, several professors, including me, rendered services relating to the lawyers' request for payment pursuant to their contract with the State of Texas, which was submitted to and approved by Federal District Court Judge David Folsom. I also helped prepare the lawyers' application for fees in the arbitration process created by the settlement agreement.

By the time my work on fees began, I had been involved in the case for the better part of two years. During much of this period—and, to the best of my recollection, during the entire period in which the payment of fees was at issue—I worked without compensation, except for reimbursement of ex-

47. Professor Brickman misses or distorts the point of this paragraph, which is that disclosure is a double-edged sword. See *Rejoinder*, *supra* note 2, at 784.

48. One could argue that all professional relationships should be disclosed in academic writings, including pro bono undertakings. Although this is not the place to debate that issue, for the benefit of those who hold this view I reiterate the disclosure issued above.

49. See, e.g., Charles Silver, "We're Scared To Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1397 n.166 (2003) (disclosing that the "author is cocounsel for the plaintiff"); Lynn A. Baker & Charles Silver, *Introduction: Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1546 (2002) (acknowledging sources of funding for a conference); Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29, 32 (2001) (acknowledging assistance of the International Association of Defense Counsel and the Defense Research Institute).

50. *Theory Class*, *supra* note 1, at 163.

51. The names of the other law professors will be provided on request.

penses. I may be the only lawyer in Texas who lost money on the State's tobacco case.<sup>52</sup>

The facts notwithstanding, Professor Brickman asserts that the private attorneys retained me "to give [my] blessing to their fee request."<sup>53</sup> Obviously, his aim is again to use persuasive language to impugn my character and my clients' motives. I certainly do believe that Texas should have honored its commitment to the private lawyers instead of reneging, but the subject of fees had nothing to do with the lawyers' decision to seek my assistance.

*Misstatement 6: Professor Brickman criticizes me for asserting that "political forces opposed to the trial lawyers [who handled Texas' tobacco case]" helped bring about the outcome in Burrow v. Arce when "no evidence" of political influence exists.*<sup>54</sup>

In *Burrow v. Arce*, the Texas Supreme Court created a remedy of fee forfeiture for breach of fiduciary duty in the absence of provable harm.<sup>55</sup> I have previously critiqued the court's opinion in careful detail.<sup>56</sup> Its flaws are glaring.

In the article where I criticize the opinion on the merits, I also contend that a partisan political group aligned against trial lawyers attempted to influence the court's decision and evidently succeeded.<sup>57</sup> Professor Brickman castigates me for making this charge, claiming that "no evidence" supports it.<sup>58</sup>

Professor Brickman willfully ignores the role Texans for Reasonable Legal Fees (TRLF) played in both *Arce* and the post-settlement effort to prevent the private attorneys who won Texas tobacco case from being paid.<sup>59</sup> TRLF is a partisan group that leaders of the Texas tort reform movement created specifically to attack the payment of fees in the Texas tobacco case.<sup>60</sup> TRLF also filed a series of paid amicus curiae briefs in *Arce*.<sup>61</sup> In these

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52. In his *Rejoinder*, *supra* note 2, at 784, Professor Brickman accuses me of attempting to pull the wool over readers' eyes by falsely implying that I "was not compensated for [the] affidavit" I submitted in support of their application for fees. There is no deception. To the best of my recollection, I submitted the affidavit—and did an enormous amount of other work relating to the settlement and attorneys' fees—without compensation. Professor Brickman persists in denying facts of which he has no knowledge and in seeing clever duplicity where there is none.

53. *Theory Class*, *supra* note 1, at 163.

54. *Id.*

55. 997 S.W.2d 229, 240 (Tex. 1999).

56. See generally, *Critique of Burrow*, *supra* note 5.

57. *Id.* at 331 (discussing participation of Texans for Reasonable Legal Fees as amicus curiae in *Burrow*).

58. *Theory Class*, *supra* note 1, at 163.

59. *Id.* (failing to mention that Texans for Reasonable Legal Fees participated as amicus curiae in *Burrow*).

60. See, e.g., Texans for Lawsuit Reform, Biography of Hugh Rice Kelly, <http://www.tortreform.com/bios.asp?BioID=9> (stating that Kelly, who co-founded Texans for Lawsuit Reform, was "instrumental in founding Texans for Reasonable Legal Fees and in preserving the state's right to contest the \$3.3 billion legal fee awarded to the five Texas tobacco lawyers").

61. Brief of Amicus Curiae Texans for Reasonable Legal Fees, *Burrow v. Arce*, 997 S.W. 2d 229

briefs, TRLF argued that *Arce* was the Texas Supreme Court's opportunity to create a legal rule that would bolster the case for fee forfeiture in the Texas tobacco case.<sup>62</sup> The lawyer who represented TRLF in *Arce* also represented certain Texas politicians who intervened in the tobacco case to attack the fee payment.

The evidence that "political forces" sought to influence the Texas Supreme Court's decision in *Arce* is clear.<sup>63</sup> I cannot imagine why Professor Brickman disputes this.<sup>64</sup>

### III. THE ROLE OF LAW PROFESSORS IN FRAMING PUBLIC DISCOURSE ABOUT ATTORNEYS

It hardly needs saying that lawyers are unpopular and that trial lawyers are especially so. New evidence emerges almost daily. Lawyers ranked third from last in a December, 2004 Gallup poll of public trust in the professions.<sup>65</sup> Efforts to tar John Edwards during the recent electoral contest are not responsible for this—lawyers have occupied the bottom rungs in opinion polls for years—but neither did Edwards' presence on the Democratic ticket or his campaign in support of civil trial processes improve matters. In particular, they did not protect trial lawyers from tort reformers' efforts to put them out of business. Floridians voted 2 to 1 in favor a constitutional amendment limiting contingent fees in medical malpractice cases, a far larger majority than President Bush enjoyed in the state's popular vote.<sup>66</sup>

(Tex. 1999) (No. 98-0184); Supplemental Brief Amicus Curiae of Texans for Reasonable Legal Fees, *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (No. 98-0184).

62. See Brief of Amicus Curiae Texans for Reasonable Legal Fees, *supra* note 61, at n.10 (explaining that TRLF was created to oppose the payment of fees in the Texas tobacco case and arguing that the fee arrangement created by the State's agreement with private counsel was created "to completely bypass State constitutional requirements of legislative controls on State expenditures and compensation of State agents").

63. In his *Rejoinder*, *supra* note 2, at 787, Professor Brickman writes as follows: "Presumably, Professor Silver would include in the ambit of 'political forces' the three amicus briefs he filed in *Arce* in favor of the tort lawyers." No, I would not. Unlike TRLF, I am not a partisan political organization. I do not receive contributions from persons who seek to influence governmental processes, and I do not use other people's money to advance a political agenda. My amicus briefs were uncompensated efforts to use careful legal analysis and economic reasoning to convince the Texas Supreme Court to require plaintiffs in breach of loyalty cases to prove harm. My briefs were no more political than other uncompensated efforts by law professors to educate judges.

64. In his *Rejoinder*, *supra* note 2, at 787 Professor Brickman asserts that I have somehow "acknowledge[d] that . . . not even the slenderest of reeds" supports my charge that the Texas Supreme Court "responded to [political] pressure" in *Burrow*, and that I have softened my position by asserting that "political forces" sought to influence the Texas Supreme Court." My position has not changed, and I do not see why Professor Brickman thinks it has.

65. Jesse Westbrook, *Nurses Again Top List in Public Trust Survey*, HOUSTON CHRON. Dec. 9, 2004, at 10, available at 2004 WL 101437033 (reporting results of survey of public trust in professions and stating that "lawyers . . . routinely reside at the bottom of the list").

66. See National Association of Public Hospitals, General Election 2004 Ballot Initiatives, available at [http://www.naph.org/Content/ContentGroups/Hot\\_Topic/](http://www.naph.org/Content/ContentGroups/Hot_Topic/)

To my knowledge, law professors' opinions of lawyers have never been polled. Presumably, we like lawyers and have more respect for them than does the general public. Self-interest alone should propel us to hold pro-lawyer views.<sup>67</sup> Law students pay our salaries, and we help them become practicing attorneys in return. We should think highly of our graduates if only to keep the gravy flowing.

And yet, few law professors are outspoken advocates for trial lawyers or defenders of the legal profession more generally. The debate over the proposal to cap contingent fees in Florida provides anecdotal evidence. Although Florida's ten law schools collectively boast more than 300 full-time faculty members, few appear to have publicly opposed the amendment. They could have published advertisements with dozens or hundreds of signatures urging voters to reject the proposal. They could have lit up reporters' phone lines and asked to be quoted. They could have published editorials in newspapers across the state. Judging from repeated Google searches and communications with friends in the state, they did none of these things. Florida's many law professors appear to have remained on the sidelines while access to legal services was curtailed.

Their passivity may have had many causes: inertia, collective action problems, feelings of powerlessness in the face of an oncoming train, even fear of being refused treatment by physicians. Let me suggest one more reason: the absence of a passionate belief in the value of legal services. Although law schools are factories for new lawyers, few professors know much about the social and economic contributions lawyers make. Most care about the subjects they teach and whether their students learn, but most know little about the positive impact law and lawyers have on our economy and society.<sup>68</sup> Many suspect, fear, or believe that law and lawyers impede progress, as the lawyer-bashing crowd contends.<sup>69</sup> Harvard Law School Dean Derek Bok spoke for this sizeable lawyer-loathing contingent when he lamented that high salaries for lawyers had created a "regrettable situation" in which "the best and brightest young minds [were lured] away from science, engineering, education, and public service and into the legal profession

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2004\_Health\_Related\_State\_Ballot\_Initiatives.pdf (reporting that 63.3% of Florida voters voted in favor of the Medical Liability Claimant's Compensation Amendment); CNN.com, <http://www.cnn.com/ELECTION/2004/pages/results/states/FL/P/00/index.html> (reporting that President Bush received 52% of the popular vote in Florida).

67. In his *Rejoinder*, *supra* note 2, at 791, Professor Brickman seems to think that this sentence espouses a normative proposition. Obviously, it does not. It merely notes the clash between law professors' self-interest and the disdain many professors have for practicing attorneys.

68. Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1737 (2002).

Legal academics study the law extensively, but the great bulk of this research dwells upon the analysis of particular laws or doctrines . . . . While such research is unquestionably valuable, law professors have fallen far short when it comes to the study of the effect of law and laws on the economic welfare of nations.

*Id.*

69. Ironically, some economists now believe more strongly than many law professors do in the importance of well-functioning legal institutions, easy access to courts, and a vibrant legal sector. *Id.* at 1738 (reporting that "[t]he new institutional economics has used history and theory to make the case that legal institutions are crucial to economic development").

and business.”<sup>70</sup> Yale Law School Dean Anthony Kronman also represented this branch of the professoriate when he characterized lawyering for private clients as an “amoral” pursuit except when “tempered by a concern for the public good,” and immediately added that “the level of public-spiritedness within the profession is today dismally low.”<sup>71</sup>

The persistence of lawyer-loathing within the academy surprises me, both because so little evidence supports most anti-lawyer claims and because law professors would seem to have every reason to hold pro-lawyer views. Yet, inside the academy, one gains more prestige by attacking lawyers than by demonstrating the importance and general high quality of their work. Books purporting to show that the legal profession is in terrible shape—books like Mary Ann Glendon’s, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*<sup>72</sup>—generate much more interest than better (though less provocative) works like Susan P. Shapiro’s *Tangled Loyalties*, an empirical study finding that lawyers take interest conflicts seriously and adhere to higher standards than other professionals when handling them.<sup>73</sup>

Within law schools, even the most passionate believers in the power of legal services to enhance human welfare often criticize attorneys harshly. I have in mind here professors and clinicians who claim that law has significant untapped potential to improve the lives of the poor. Many of these individuals loudly complain that lawyers take too few charity cases, effectively aligning themselves with anti-law tort reformers who accuse lawyers of being driven excessively by greed.<sup>74</sup> Thus does the legal profession find itself attacked from the left and the right.

Outside the academy, the popular and legal presses also reward law professors for bad-mouthing attorneys. Patrick Schiltz would have attracted little attention had he praised lawyers for working long hours and putting clients’ needs ahead of their own. Instead, after he called lawyers greedy and worse, the *American Lawyer* anointed him the legal profession’s “Public Enemy No. 1.”<sup>75</sup> I find this a strange “honor” for a law professor to receive. I

70. See generally, Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

71. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 365 (1993). See also WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 1 (1998) (reporting that law school and law practice destroy young people’s hopes of contributing to society).

72. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

73. SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002).

74. See, e.g., Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1019 (2004) (describing evidence that lawyers do very little pro bono work for the poor).

75. American Lawyers Media, *Of Money and Misery*, AM. LAW., Apr. 1999, at 31 (interviewing Professor Patrick Schiltz).

also find it odd that Schiltz received it, for he is neither the most prominent lawyer-bashing professor nor the most aggressive.

Schiltz pales by comparison to Professor Brickman. After Democrats nominated John Edwards for Vice President, many media outlets quoted Brickman's statement that "trial lawyers will be mortgaging their Learjets to kick money into this campaign."<sup>76</sup> After Florida voters approved a constitutional amendment that will automatically revoke the license of any physician with three malpractice judgments, dozens of newspapers printed Brickman's prediction that trial lawyers will file meritless lawsuits in droves, expecting doctors to settle rather than risk losing in court.<sup>77</sup> In testimony to Congress criticizing bankruptcy pre-packs of asbestos claims, Brickman accused trial lawyers of "targeting defendants at risk of failure and 'making them an offer they can't refuse.'"<sup>78</sup>

Comments like these lend credence to the distorted picture of civil litigation and plaintiffs' attorneys the media has long been known to present. The press gives far more space to matters that are rare or extreme—commercial airplane crashes, for example—than to matters that are run-of-the-mill—safe takeoffs and landings. Large plaintiff verdicts and big lawsuits therefore get more column inches than pretrial dismissals, defense wins, small settlements, remittiturs, and appellate reversals. Attorneys also make the front pages mainly when they get in big trouble, are involved in unusual, high-profile representations, or win large cases that produce sizeable fees. Routine client representations receive little or no mention.

Simple math can drive home the preceding point. The U.S. has about one million attorneys.<sup>79</sup> If one percent of them were to make one serious error per year, the annual tally would be 10,000 serious mistakes.<sup>80</sup> Equally, if only one percent of them were fabulously rich, 10,000 lawyers might own yachts or private planes. Either way, the media would have plenty of extreme stories about wealthy lawyers and bungling lawyers to report. The same is true of civil litigation. The National Center for State Courts reports

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76. Matthew C. Quinn, *Election 2004: A Kerry-Edwards Ticket*, ATLANTA JOURNAL-CONSTITUTION, July 7, 2004, at A6, available at 2004 WL 81366311.

77. See, e.g., David Royce, *Malpractice measures have experts worried; An increase in lawsuits expected*, THE TALLAHASSEE DEMOCRAT, Feb. 26, 2004, available at 2004 WL 99825643.

78. Richard Banks, *US probes 'pre-pack' scandal*, INSURANCE DAY, July 23, 2004, available at, 2004 WL 57517170. In his *Rejoinder*, *supra* note 2, at 788, Professor Brickman asserts that this paragraph "presents a slanted selection of news media quotes." If the selection is slanted, then Professor Brickman should be able to present a sample of his public statements that includes equally flamboyant media quotes praising trial lawyers. No such statements appear in his *Rejoinder*.

79. U.S. Census Bureau, *Statistical Abstract of the United States (2004-2005)*, Table 597 (reporting that the U.S. had 952,000 lawyers in 2003).

80. The choice of the one percent figure is intentional. The Harvard Medical Practice Study found that about one percent of hospitalized patients were harmed as a result of substandard care, with many errors causing serious injuries or death. Yet, it is widely (if also mistakenly) believed that the U.S. offers the best health care in the world, and the academic literature on patient safety displays little tendency to bash hospital administrators, physicians, or nurses. To the contrary, the literature argues that bad systems are to blame for mistakes, not bad people. For a discussion, see David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, CORNELL L. REV. (forthcoming 2005).

that over sixteen million civil cases were filed in the U.S. in 2002.<sup>81</sup> If only one percent of these involved procedural abuses, substantive injustices, or other outrages, 160,000 instances of lawsuit abuse would occur. And if only one percent of civil lawsuits involved stakes above, say, ten million, there'd be 160,000 enormous lawsuits. The media could hardly keep up with so many extreme cases.

Yet, the resulting news coverage would convey a highly distorted picture of the legal profession and civil justice processes. Empirical studies consistently show that both are working better than is commonly believed. Consider medical malpractice litigation, claims concerning which are in the news every day. Careful studies show that health care errors are unacceptably common, that injured patients rarely sue, that plaintiffs' attorneys reject questionable cases, that cases that look strong initially are quickly dropped when discovery shows them to be weak, that settlements and verdicts correlate strongly with the severity of patients' injuries and expert evaluations of the quality of care, that patients usually recover less than their hard economic losses, that expert panels favor plaintiffs more often than juries do, and that jury verdicts have increased mainly in response to rising wages and (especially) health care costs.<sup>82</sup> The studies thus falsify most of the assertions on which calls for damages caps and other tort reforms are based. Even claims of defensive medicine, physician flight, legal fear, and impaired access to care have been deflated. Reports of a litigation-driven "crisis" in health care have little or no empirical foundation.<sup>83</sup>

Few things are easier than bashing lawyers and civil courts. Few things are also more certain to happen without law professors' help. As William Haltom and Michael McCann show in *Distorting the Law: Politics, Media, and the Litigation Crisis*, and as Stephen Daniels and Joanne Martin showed years before them in *Civil Juries and the Politics of Reform*, an enormous

81. National Center for State Courts, *Examining the Work of State Courts, 2003* (2004), available at [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_Main\\_Page.html](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html).

82. Sources supporting most of the assertions in this sentence can be found in David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, CORNELL L. REV. (forthcoming May 2005). For reviews of studies of studies showing that the tort system does a decent job of sorting valid and invalid malpractice claims, see STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); Tom Baker, *Making Sense With Numbers: The Uses and Abuses of Empirical Research On the Validity of Medical Malpractice Claims*, J. L., MED. & ETHICS (forthcoming 2005). On trends in jury verdicts and their causes, see Seth A. Seabury, Nicholas M. Pace, & Robert T. Reville, *Forty Years of Civil Jury Verdicts*, J. OF EMPIRICAL LEGAL STUDIES 1, 1-25 (2004). For information about trends in claims and payments, see Bernard Black, Charles Silver, David A. Hyman, & William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, J. OF EMPIRICAL LEGAL STUDIES (forthcoming July 2005), and Neil Vidmar, Paul Lee, Kara MacKillop, Kieran McCarthy & Gerald McGwin, *Seeking the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, DEPAUL L. REV. (forthcoming 2005).

83. See David A. Hyman & Charles Silver, *Believing Six Improbable Things: Medical Malpractice and "Legal Fear"*, 28 HARV. J.L. & PUB. POL'Y 107 (2005); David A. Hyman & Charles Silver, *Speak Not of Error*, 28 REGULATION 52 (Spring 2005).



industry exists for the purpose of casting trial lawyers and tort processes in the worst possible light. Law professors can sleep soundly at night knowing that if we miss any significant transgressions by plaintiffs' attorneys, the Walter Olsons, Peter Hubers, and Phillip Howards of the world will draw attention to them. The same cannot be said of lawyers' innumerable positive contributions.

#### IV. CONCLUSION

This article began as an effort to correct the record, which Professor Brickman littered with statements about me that are false and misleading. It ended with a more general discussion of the role law professors do and should play in shaping public discourse about attorneys. The first discussion means more to me personally, but the second is more important. Antipathy for lawyers did not develop overnight. It has existed for centuries, and it has been carefully and extensively nurtured in recent decades. Overcoming it will require years of devotion and hard work. As a group, law professors are well placed to improve the public's understanding of lawyers and legal processes, and to suggest ways lawyers and legal processes can better serve the public's needs.